No. 90-576

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PHILIPPINES, MICRONESIA & ORIENT NAVIGATION COMPANY,

Petitioner,

—v.—

NYSA-ILA PENSION TRUST FUND, THE BOARD OF TRUSTEES OF THE NYSA-ILA PENSION TRUST FUND, THE NEW YORK SHIPPING ASSOCIATION, THE NYSA-ILA FRINGE BENEFIT ESCROW FUND, THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (AFL-CIO),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Philippines, Micronesia & Orient Navigation Company ("PM&O") seeks a writ of certiorari to review a judgment determining (1) that PM&O is an employer subject to pension withdrawal liability under the Employee Retirement Income Security Act ("ERISA"), Pub. L. 93-406, 88 Stat. 829 (1974), as amended by the Multiemployer Pension Plan Amendments Act ("MPPAA"), Pub. L. 96-364, 94 Stat. 1208 (1980), and (2) that PM&O is not entitled to a refund of employee benefit assessments paid by it during the period

when it engaged in vessel carrier operations in the Port of New York. None of the grounds urged by PM&O warrants review by this court.

STATEMENT OF THE CASE

PM&O's petition depends upon a wholesale revision of the facts in this case. Citing to material that is not before this Court,[1] PM&O makes assertions that are simply not true. Rather than burden the Court with a complete counterstatement of the case, respondents[2] will focus on the more egregious misstatements.

PM&O Was A Party To The Collective Bargaining Agreement

PM&O claims that it was not bound to the New York longshore labor contract, known as the General Cargo Agreement ("GCA"). It argues that it did not become a signatory to the GCA, since it only signed subscriptions that did not adequately disclose what it was agreeing to. Hence, it claims that it "never understood and was never told that it was undertaking any obligation to contribute to the pension fund." *See* PM&O's Petition for Certiorari (hereinafter "Pet.") at 5.[3]

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1 PM&O's record citations are to the joint appendix in the court of appeals, which PM&O has failed to include in the appendix to the petition filed with this Court. Thus, PM&O is at liberty to make assertions and characterizations which this Court has no opportunity to verify.

2 Respondents are the NYSA-ILA Pension Trust Fund and its Board of Trustees, which will be collectively referred to as "PTF", New York Shipping Association, Inc. ("NYSA"), NYSA-ILA Fringe Benefits Escrow Fund ("Escrow Fund"), and the International Longshoremen's Association, AFL-CIO ("ILA"). Pursuant to Rule 29.1 of the Rules of this Court, counsel for respondents certify that none of the respondents has a corporate parent or any subsidiaries.

3 If PM&O was in fact ignorant, it was a direct result of PM&O's voluntary choice not to examine the labor contract it subscribed. This

(footnote cont'd on succeeding page)

The contract executed by PM&O with its stevedore, Maher Terminals, Inc., contained a provision requiring PM&O to become a party to the New York longshore labor contract and to agree to pay directly fringe benefit and other contractual assessments. Without ever examining this labor contract, PM&O executed both the stevedoring contract and three successive subscription agreements binding PM&O to the GCA for three successive three-year terms.[4] The subscription agreements left no doubt that by subscribing PM&O was agreeing to become a party to the collective bargaining agreement. Each subscription was co-signed by the ILA. PM&O knew from the face of the subscriptions that it was agreeing with the union to pay contributions pursuant to the underlying collective bargaining agreement.

For the five-year period prior to its withdrawal PM&O paid in excess of $2 million in assessments. PM&O well knew that the assessments it was paying were destined for longshore benefit funds. Its stevedoring contract made clear that the assessments "are to be paid by the Line [PM&O] directly to the NYSA-ILA funds . . . [for] Fringe Benefits." Indeed, in its complaint in this case, PM&O admitted thrice that it made contributions to PTF and other longshore employee

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(footnote cont'd from preceding page)

omission, however, would not relieve PM&O of its obligations to PTF. "[A] party who signs a written agreement generally is bound by its terms, even though he neither reads it nor considers the legal consequences of signing it." *Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501, 1504 (9th Cir. 1984). In any event, PTF's assessment of withdrawal liability should not have come as a surprise to PM&O. More than three years earlier PTF had apprised PM&O of the amount of its potential withdrawal liability as it existed at that time. At no time prior to its leaving the port did PM&O disavow either its employer status or its obligation to pay withdrawal liability.

4 PM&O's accusation that respondents did not allow PM&O to see the labor contract, *see* Pet. at 7, is preposterous. Nothing prevented PM&O from obtaining a copy from respondents or from its own stevedore. The fact is that PM&O voluntarily chose not to examine the labor contract. It cannot now blame respondents for its own ostrich-like stance.

benefit funds. The fact of the matter is that PM&O was not concerned about assuming the obligation for longshore pension and other fringe benefit assessments because any amounts it paid were recouped dollar for dollar from Castle & Cook, the customer for whom PM&O carried on its transport operations.

The Labor Contract Imposed On PM&O The Obligation For Pension Contributions

PM&O asserts that it had no obligation to contribute to PTF under the labor contract. *See* Pet. at 7-9. PM&O attempts to characterize the labor contract as placing upon NYSA the obligation for pension contributions and upon the stevedoring companies, like PM&O's stevedore, Maher, the responsibility for paying assessments to NYSA to meet the association's obligations. PM&O's assertions fly in the face of the clear language of the labor contract and were flatly rejected by the Second Circuit not only in this case but in an earlier withdrawal liability case involving PTF, *Korea Shipping Corp. v. NYSA-ILA Pension Trust Fund*, 880 F.2d 1531 (2d Cir. 1989).

The GCA expressly provides that the contractual commitments are those not of NYSA but of "each contracting stevedore and vessel carrier who directly or indirectly utilizes the services of any employees covered by this agreement." The contract provides that by its execution a vessel carrier, like PM&O, binds itself "to each and every term and condition of the agreement, including, without limitation, the contribution of its proportionate share of the hourly, tonnage and other supplemental and fringe benefit contributions provided herein." These provisions are sufficient in and of themselves to lay to rest PM&O's canard. They establish that it is not NYSA but the individual carriers who are contractually obligated to make fringe benefit contributions.

The analysis of the labor contract could end here, but its other terms confirm where the contractual obligation lies. GCA's pension provisions leave no doubt that the obligation

to fund PTF is that of the contracting employers, not NYSA. The GCA provides that "the employers' [plural] contribution to the NYSA-ILA Pension Trust Fund shall be as set forth in . . . Part VI(6) hereafter," which, in turn, speaks of pension guarantees to "be contributed by the employers [plural]."[5]

The express language of the labor contract also dispels PM&O's other canard, that the obligation for assessments is that of the stevedores, not the carriers. The tonnage assessment portion of the GCA defines precisely which employers are responsible for the contributions. It states that the tonnage assessment is designed "to meet obligations arising under collective bargaining agreements between New York Shipping Association, Inc. ('NYSA') and International Longshoremen's Association, AFL-CIO ('ILA') for *pension*, welfare and clinics, guaranteed annual income ('GAI'), vacations, holidays, and *the minimum guarantees for pensions*, welfare and clinics, supplemental cash benefits, as well as administrative support of NYSA." (emphasis supplied). Then, it states that "*each vessel carrier* (both private and governmental) shall be responsible for an assessment amount per ton" calculated by dividing the estimated liabilities for the above obligations by the estimated tonnage to be loaded or discharged in the port (emphasis supplied). The GCA's tonnage assessment thus provides the mechanism for generating the monies needed to fund the contractual pension obligations and imposes the responsibility for those assessments not on the stevedores but on the carriers. *See Korea*, 880 F.2d at

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5 The fatuity of PM&O's case is evident from the fact that PM&O must resort to an alteration of the dispositive language of the contract. Whereas the GCA refers to the "employers' " contribution to PTF, PM&O's version, which purports to be a direct quote, changes this to the singular: "employer's." *See* Pet. at 8. Whereas the preamble to the GCA refers to "Contracting Stevedores," PM&O's version, which again purports to be a direct quote, uses the term "member stevedores." Appended to this brief are copies of the pertinent pages of the GCA as they appeared in the joint appendix in the court of appeals, which PM&O has not furnished to this Court.

1539.[6] PM&O cites a provision in the GCA which it reads as placing the responsibility for paying assessments on the stevedores. *See* Pet. at 9 n. 9. The cited provision, however, deals only with the assessment collection mechanism.[7] The obligation for assessments is spelled out in the provision discussed above, which places it squarely upon "each vessel carrier."

The NLRB Did Not Find That PM&O Was Not A Longshore Employer

PM&O brandishes a letter from a Regional Director of the National Labor Relations Board which refused to process a complaint filed by the ILA against PM&O. *See* Pet. at 10. The Regional Director's refusal was based upon his finding that PM&O was not a joint employer required to bargain over the effects on longshore workers of PM&O's cessation of shipping operations. In PM&O's view this determination resolves PM&O's employer status under MPPAA. Apart from the fact that a Regional Director's determination is not a decision of the NLRB and is devoid of any precedential or preclusionary value, a determination of joint employer status under the National Labor Relations Act, which depends upon considerations akin to the common law, has no bearing upon employer status under MPPAA. *See Korea*, 880 F.2d at 1537.

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6 Under the GCA the only way that a stevedore can be liable for the payment of assessments is if it services a carrier which is not a party to the collective bargaining agreement. It is for this reason that PM&O's stevedore, Maher, had a provision in its standard stevedoring contract requiring PM&O to subscribe to the New York contract.

7 PM&O's claim that it paid monies only to NYSA and not to a multi-employer pension plan is but a variation of its claim that NYSA was the contributing-obligor. PM&O tries to bolster its argument by mischaracterizing the words of others. It points to a stipulation from respondents' counsel that "no payments were ever made by PM&O to the ILA Pension Fund." Obviously, what counsel was referring to was the fact that PM&O never remitted payments directly to PTF but made its contributions *via* the contractual collection mechanism.

Summary of Reasons For Denying the Writ

In adopting the contributing-obligor test for determining MPPAA employer status the courts below construed MPPAA in a manner which effectuates the broad remedial purposes of the statute. Their approach conformed to well-settled principles of statutory construction and did not conflict with any decision of this Court.

The common law test urged by PM&O for determining MPPAA employer status would totally frustrate the purposes of MPPAA by enabling those who have promised to fund pension benefits to escape from a pension plan without paying their share of the plan's unfunded vested benefits. The courts below properly refused to endorse this common law approach.

The contributing-obligor test does not conflict with any other case law or statute. Indeed, the cases which PM&O claims are in conflict actually support the test, since the touchstone for liability in those cases is the obligation to contribute.

In dismissing PM&O's claim for a refund of all fringe benefit assessments paid, the courts below correctly concluded that the relief sought by PM&O is prohibited by this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982).

REASONS FOR DENYING THE WRIT

1. The Manner In Which The Courts Below Construed MPPAA Did Not Conflict With Any Decision Of This Court

PM&O contends that in adopting the contributing-obligor test for determining MPPAA employer status, the courts below failed to abide by this Court's holding in *Community For Creative Non-Violence v. Reid*, 490 U.S. ____, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). In PM&O's view *Reid* stands for the broad proposition that in construing a statute, a court must look solely to the common law or dictionary meaning

of the language used by Congress. PM&O's formulation is an overstatement of the teachings of *Reid*.

Reid did not disturb the settled rule of statutory construction that a term must have the meaning intended within the context of the particular statutory regime in which it appears. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944); *see also Reid*, 104 L.Ed.2d at 824 (citing *Hearst* for "rejecting agency law conception of employee for purposes of the National Labor Relations Act where structure and context of statute indicated broader definition"). Nor did *Reid* overrule this Court's holding in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979), that statutory language must be interpreted to effectuate the purpose and policy of the legislation. *See also Watt v. Alaska*, 451 U.S. 259, 266 (1981); *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966). Hence, *Reid*'s resort to the common law to define the term "employee" in the Copyright Act of 1976 has no applicability to the proper construction of the term "employer" in MPPAA, a remedial statute which must be liberally construed to accomplish the congressional objective of protecting workers' retirement benefits and the fiscal soundness of multiemployer pension plans. *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127 (3d Cir. 1986).[8]

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8 In defining "employer" for purposes of federal labor legislation, the courts refuse "to adhere to the rigid, conceptualistic notion of the employer-employee relationship." They look to realities, not "vacuum-packed concepts." *Bey v. Muldoon*, 223 F. Supp. 489, 494 (E.D.Pa. 1963), *aff'd*, 354 F.2d 1005 (3d Cir.), *cert. denied*, 384 U.S. 987 (1966). The touchstone for employer status is not some technical common law label, but rather the performance of those acts and functions regulated by the federal legislation. *Falk v. Brennan*, 414 U.S. 190, 195 (1973) (Fair Labor Standards Act ("FLSA")); *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961) (FLSA); *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (Social Security Act); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726-30 (1947) (FLSA); *United States v. Silk*, 331 U.S. 704, 711-12 (1947) (Social Security Act); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 120-29 (1944) (National Labor Relations Act); *Donovan v. Agnew*, 712 F.2d 1509, 1510 (1st Cir. 1983) (FLSA); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754-56 (9th Cir. 1979) (FLSA); *Hoke v.*

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The courts below construed MPPAA in a manner consistent with the rules of statutory interpretation enunciated by this Court. They adopted a definition of employer which effectuated the purpose and policy of MPPAA.[9] As this Court has noted, the purpose of MPPAA is to assure that the parties who undertake to fund a multiemployer plan do not impair the fiscal soundness of the plan or shift their obligations to others by walking away from the plan without having satisfied their portion of the plan's unfunded vested benefits. *Connolly v. PBGC*, 475 U.S. 211, 216-17 (1986). The class Congress sought to regulate is manifestly those who undertake to fund multiemployer plans. Congress denominates this undertaking as the "obligation to contribute."

This obligation is expressly defined as one arising under a collective bargaining agreement. 29 U.S.C.A. § 1392(a)(1) (West 1985). The walking away, or withdrawal, occurs when the obligation to contribute ceases. 29 U.S.C.A. § 1383(a)(1) (West 1985). This obligation relates solely to multiemployer plans, which are expressly defined as plans maintained pursuant to collective bargaining agreements. 29 U.S.C.A. § 1301(a)(3) (West 1985 and Supp. 1990). All the signposts of MPPAA, then, point to the collective bargaining agreement as the foundation for the entire statutory edifice.

From among those parties who are employers by virtue of their collective bargaining agreements MPPAA regulates only those who contractually commit themselves to contribute. Thus, the party to a collective bargaining agreement who has the obligation to contribute to a plan is the MPPAA

(footnote cont'd from preceding page)

Retail Credit Corp., 521 F.2d 1079, 1082 n.7 (4th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976) (Fair Credit Reporting Act); *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 299-300 (5th Cir. 1975) (FLSA).

9 Senator Williams, one of the principal sponsors of MPPAA, explained to the Senate, "We intend that the term 'employer' be construed in a manner consistent with the bill and its purposes." 126 Cong. Rec. S11,672 (daily ed. Aug. 26, 1980). *See also* 136 Cong. Rec. H23,038 (daily ed. Aug. 25, 1980) (statement of Rep. Thompson).

employer upon whom Congress has imposed withdrawal liability. Indeed, virtually every provision of MPPAA conjoins "employer" with the obligation to contribute.[10] This same coupling pervades MPPAA's legislative history.[11]

It would totally frustrate the purpose and policy of MPPAA, then, to define the term "employer" without reference to the obligation to contribute. The courts below amply guarded against such a result by defining the MPPAA employer as the entity with the obligation to contribute. Their approach comported with established principles for construing broad remedial statutes. Nothing in *Reid* suggests that their approach was improper. Not surprisingly, no court has refuted the Second Circuit's contributing-obligor test; the Eleventh Circuit expressly adopted it. *See Carriers Container Council, Inc. v. Mobile Steamship Ass'n—International Longshoremen's Ass'n Pension Plan*, 896 F.2d 1330, 1343 (11th Cir.), *cert denied*, 59 U.S.L.W. 3294 (U.S. Oct. 15, 1990) (No. 90-323).

It is the common law test, which PM&O espouses, *see* Pet. at 13-18, that would frustrate the legislative goal of MPPAA. The common law test would render MPPAA meaningless in those industries in which the obligation to contribute is borne by other than the common law employer. In the longshore

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10 *See, e.g.*, 29 U.S.C.A. §§ 1001a(a)(4)(A); 1002(37)(a)(i); 1053(a)(2)(A); 1053(b)(3)(D)(iii); 1301(a)(2)-(3); 1341a(a)(2); 1341a(e); 1342(d)(2)(E); 1365(3)(C); 1383(a)-(d); 1384(a)(1)(b); 1385(a)-(b); 1387(a)-(b); 1388(a)-(d); 1390(a)-(b); 1391(b)-(c); 1394(b); 1396(c); 1397(a); 1398; 1399(c)(1)-(C)(i); 1403(b)(4)(A); 1405(c); 1412(e)(2); 1422(a)(2)(A); and 1425(b)(1)-(A)(ii) (West 1985 and Supp. 1990).

11 *See, e.g., Proposed Amendments to the Employee Retirement Income Security Act of 1974: Hearings on S. 1076 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 114, 115, 137, 170, 592 (1979); H.R. REP. NO. 869 (Part II), 96th Cong., 2d Sess. (1980), *reprinted in* PENSION PLAN GUIDE, ISSUE NO. 275, No. 266, May 7, 1980 (CCH) at 4-7, 9, 27, 30, 31, 33, 35, 37-39, 44, 45, 48, 51-54, 60, 64-67, 72, 73; JOINT SENATE REPORT ON MPPAA BILL OF 1980, 96th Cong., 2d Sess. (1980), *reprinted in* PENSION PLAN GUIDE, ISSUE NO. 289, No. 280 Part II, August 8, 1980 (CCH) at 5-15, 17-19, 21, 24, 28, 29, 31-35, 37-39, 41, 50, 56, 58.

industry in New York only steamship carriers pay pension contributions; stevedores do not. Under PM&O's view of employer status, the persons having the obligation to contribute are not employers and the common law employers have no obligation to contribute. Under this theory, no one in the longshore industry in the Port of New York would bear any responsibility for withdrawal liability, despite the unequivocal commitment of the New York labor contract to provide defined pensions to longshore employees. The longshore industry, therefore, would be removed from the protective aegis of MPPAA—a result hardly intended by Congress.

2. The Test For MPPAA Employer Status Adopted Below Is Consistent With ERISA And Is Not In Conflict With Any Case Law Or Statute

Contrary to PM&O's contentions, adoption of the contributing-obligor test does not create any internal inconsistency in ERISA, nor does it conflict with any other decisional or statutory authority. PM&O argues that the test creates tensions within ERISA, *see* Pet. at 13-18, complaining that the *Korea* court adopted the Title I definition of employer when that definition is not applicable to Title IV. PM&O misreads *Korea*. That case did not apply the Title I definition but a definition that effectuated the policy and purpose of MPPAA. *See* 880 F.2d at 1537.

PM&O also argues that the contributing-obligor test conflicts with the line of cases holding that shareholders and officers of a corporation are ordinarily not subject to withdrawal liability. *See* Pet. at 16-18. PM&O is wrong. The officer/shareholder cases, *see, e.g., Massachusetts Laborers' Health and Welfare Fund v. Starret Paving Corp.*, 845 F.2d 23 (1st Cir. 1988), do not involve the formulation of a MPPAA definition of employer but a determination of the absence of a congressional intent to remove the traditional protections of the corporate shield and limited liability. In all of these cases there is no doubt that the corporation is the MPPAA employer; the only question is whether the corporation's liability should be imposed as well on its officers and

shareholders. Accordingly, there is no tension between the contributing-obligor test and holding officers/shareholders not liable for their corporation's withdrawal liability. Indeed, the latter holding comports with the test. Officers and shareholders should not be subject to withdrawal liability, since it is their corporation, not these persons in their individual capacities, that undertook the contractual obligation to make pension contributions.

PM&O also insists that the contributing-obligor test conflicts with the holding in *Superior Pocahontas Coal Co. v. Island Creek Coal Co.*, 840 F.2d 11 (unpublished opinion), 9 Empl. Ben. Cas. (BNA) 1302 (4th Cir. 1988). *See* Pet. at 24-26. In *Superior Pocahontas* a mine operator, which was a signatory to the coal miners' collective bargaining agreement, entered into an agreement with another signatory to mine coal at a site owned by the latter. This private agreement provided that the site owner would pay the operator's pension contributions required by the collective bargaining agreement. When the mine operator subsequently incurred and paid withdrawal liability, it sought indemnification from the site owner. The court rejected the claim. The touchstone adopted by the court for imposing withdrawal liability was the obligation to contribute under the collective bargaining agreement, not under the private agreement. The labor contract imposed that obligation on the operator, not the mine owner. The real significance of *Superior Pocahontas* is that it relied on the very same contributing-obligor test adopted below.

Finally, PM&O asserts that the contributing-obligor test conflicts with Section 302 of the Labor Management Relations Act, 29 U.S.C.A. § 186 (West 1978). *See* Pet. at 20-21. This argument, which had been raised and soundly rejected by the Second Circuit in *Korea*, *see* 880 F.2d at 1538-39, was never raised by PM&O in this case. Hence, PM&O is precluded from raising it for the first time before this Court. *EEOC v. FLRA*, 476 U.S. 19, 24 (1986).

3. The Courts Below Properly Applied *Kaiser*

PM&O does not have the temerity to present to this Court the argument it made below. There, PM&O sought to recover all fringe benefit contributions it had paid pursuant to the New York longshore labor contract during its five-year tenure in the port on the ground that it paid those contributions under a mistake. The courts below concluded that under the authority of this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), PM&O was not entitled to any refund.

In its petition to this Court PM&O retreats from its refund claim. It now urges that the putative mistake would under *Kaiser* operate to shield PM&O from withdrawal liability. PM&O just does not understand *Kaiser*. That case formulated a limited exception to the congressional policy disfavoring in contribution collection suits the assertion against third-party-beneficiary employee benefit funds of defenses that are available against the contracting parties.[12] *Kaiser* held that in an action by an employee benefit plan to collect delinquent contributions, the employer may raise illegality as a defense but only when the portion of the contract containing the obligation to contribute, and not some collateral provision, is alleged to be illegal. *Kaiser*, 455 U.S. at 86. The rationale for this principle is the limitation prohibiting courts from enforcing illegal contractual promises. *Kaiser*, 455 U.S. at 77. Since withdrawal liability is not a contractual obligation but a statutory requirement, the *Kaiser* principle simply does not apply. It is not a contract but the will of Congress that the courts are being asked to enforce.

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12 Funds do not negotiate and are not parties to the labor contract. Enmeshing trust funds in disputes not their own would frustrate the congressional policy of shielding plans from "lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions." SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES, S. 1076—THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980: SUMMARY AND ANALYSIS OF CONSIDERATION, 96th Cong., 2d Sess. 44 (Comm. Print 1980).

Even if this case involved the classic illegality defense to an action by a fund to enforce an employer's contractual obligation to remit contributions, the claimed illegality would not be a valid defense. PM&O does not contend that the promise to contribute is itself illegal. Instead, it challenges another provision of the labor contract dealing with the refusal to work for non-signatory vessel carriers.[13] *Kaiser* could not be clearer: an illegality defense is permitted only "where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought." 455 U.S. at 86.

13 PM&O claims the clause is unlawful under § 8(e) of the National Labor Relations Act, 29 U.S.C.A. § 158(e) (West 1973). This claim falls within the primary and exclusive jurisdiction of the NLRB and may not be entertained by either state or federal courts. *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988); *Kaiser*, 455 U.S. at 86. Any relief that PM&O might seek from the Board is barred, however, by the six-month statute of limitations. 29 U.S.C.A. § 160(b) (West 1973).

CONCLUSION

PM&O's petition for certiorari is premised on conflicts that exist only in PM&O's fertile imagination. There are no conflicts for this Court to resolve. The decisions below were rendered in accordance with settled principles of law. PM&O's petition should be denied.

Dated: New York, New York
October 31, 1990

Respectfully submitted,

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APPENDIX

A-1082

GENERAL CARGO AGREEMENT

FOR THE PORT OF NEW YORK

PART I — Preamble

THIS AGREEMENT, made and entered into by and between the members (hereinafter sometimes referred to as the "Employers" or the "Employer-Members") of the New York Shipping Association, Inc. (hereinafter sometimes referred to as the "Association"), Deepwater Steamship Lines and Contracting Stevedores of the Port of Greater New York and vicinity, as party of the first part, and the International Longshoremen's Association (AFL-CIO), and its affiliated Locals (hereinafter sometimes referred to as the "ILA" or the "Union"), as party of the second part, covers the work pertaining to the rigging of ships, the coaling of same, the loading and unloading of all cargoes, including mail, ships' stores and baggage, and the handling of lines in connection with the docking and undocking of ships in the Port of Greater New York and vicinity.

Wages, hours, the amount of contributions for welfare (including clinical services) and pension benefits (but not the benefits to be provided by the welfare and pension plans), containerization, LASH and the duration of the term of this agreement are set forth in a separate contract (hereinafter referred

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capital attributable to the Jersey City area will be credited to the Hoboken Medical Center.

(h) CAPITAL IMPROVEMENTS

The Medical and Clinical Services Fund Trust Agreement shall empower the Trustees to provide for capital improvements of medical clinics on a long-term basis under normal and prudent business policies.

(i) RE-EVALUATION

The Welfare and Medical and Clinical Services Trust Agreements shall provide that the Trustees of both Funds, together with their staffs, not later than once within each two (2) year period, shall meet jointly for the purpose of re-evaluating and studying the programs administered by them and preparing a detailed written report to the parties with respect thereto.

3. PENSION BENEFITS

(a) The employers' contribution to the NYSA-ILA Pension Trust Fund shall be as set forth in Paragraph 3 of the Master Contract (May 27, 1980) (Annex "G") and at Part VI (6) hereinafter.

(b) Under the money allocation mentioned at Paragraph 3 of the Master Contract, improvements would be made in the Port of Greater New York contracts effective October 1, 1980 as follows:

(1) REGULAR PENSION BENEFITS:
For men now in the industry who